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Supreme Court of the United States

January Term, 1946

No. 524

MAX SHAMOS,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF GENERAL SESSIONS OF THE COUNTY OF NEW YORK

RESPONDENT'S BRIEF

FRANK S. HOGAN
District Attorney
New York County

WHITMAN KNAPP
RICHARD G. DENZER
Assistant District Attorneys
Of Counsel

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Proceedings Below

The petitioner was convicted, on December 24, 1943, in the Court of General Sessions of New York County, State of New York, of the crime of Grand Larceny in the First Degree (Penal Law, §§1290, 1294) (37-8).* That judgment was unanimously affirmed without opinion by the Appellate Division of the Supreme Court (268 App. Div. 892), and by the Court of Appeals of the State of New York (294 N. Y. 948).

* References are to folios in the printed record.

Jurisdiction

The jurisdiction of this Court is invoked upon the claim that the petitioner was denied due process of law by a series of rulings of the trial court admitting in evidence certain conversations between the petitioner and one Jacob J. Rosenblum, an attorney.

Questions Presented

The questions presented are:

(a) Was any constitutional right of the petitioner violated by the rulings now under attack? and, if so,

(b) did the petitioner properly present his constitutional claims in the state courts?

Statement of the Case

The petitioner's conviction of grand larceny resulted from his participation in a scheme or confidence game whereby he and two woman accomplices, Rose Cohen and Julia Weinstein, defrauded one Mrs. Ethel Witz of some $20,000, her entire life savings.

Mrs. Witz' contact with this group was, for the most part, with the Cohen and Weinstein women who made the majority of the misrepresentations to her concerning an allegedly momentous secret invention of the petitioner and who received her various payments as "investments" in that project. In one instance, however, Mrs. Witz met the petitioner himself who then and there succeeded in extracting $2,100 from her (125-40). It is that specific larceny of which he was accused and convicted.

The only issue seriously disputed at the trial was the identity of the petitioner as the man who met and swindled Mrs. Witz on that occasion. The principal prosecution witness was the victim herself who unequivocally identified him as the culprit (123-4). To buttress her evidence on that score, the People called one Jacob J. Rosenblum, an attorney, who connected the petitioner with the case by designating him as a man who went to extreme lengths in an attempt to mitigate the punishment of one of his already-convicted woman accomplices; and who testified to conversations with the petitioner indicating the latter's familiarity with the nature of the misrepresentations by which Mrs. Witz had been defrauded.

So far as relevant to the constitutional contentions here advanced, Rosenblum testified that he had been first retained by the petitioner after the accomplice Rose Cohen had been convicted for her share in the larceny; that the purpose of his retainer was to represent Mrs. Cohen in the matter of sentence; and that he had been authorized to offer the petitioner's money as restitution in her behalf (410-5, 423-4, 443-59). Rosenblum further testified that substantially all his conversations with the petitioner had been in the presence of third persons who were not lawyers (418, 422 *et seq.*, 740-5); and, in addition, that all conversations with the petitioner were conducted with the distinct understanding that no confidence was to attach, and that Rosenblum was to be at liberty to disclose to the Court of General Sessions and to the prosecuting authorities everything that the petitioner said to him (440-1).

POINT I

On the merits, the trial court's rulings admitting the Rosenblum testimony in evidence violated neither the New York Statute nor the Federal Constitution.

A. The ruling attacked was in accord with settled New York practice.

The petitioner's contention that the Rosenblum testimony was privileged from disclosure and, hence, that its admission constituted error "Under the law of the State of New York" (petitioner's Point II, pp. 15-18) is met at the threshold by two immutable facts: (a) substantially all of the Rosenblum conversations were had in the presence of at least one third person who was not an attorney (418, 422-6, 751-2); and (b) all of the conversations were had with the distinct understanding that their content was to be communicated to the District Attorney of New York County and to the Court of General Sessions (440-1). Either of these facts would have been sufficient in itself to destroy the privileged nature of the communication [*People* v. *Buchanan* (1895) 145 N. Y. 1, 26; *Wallace* v. *Wallace* (1915) 216 N. Y. 28, 36; *Bartlett* v. *Bunn* (Gen. Term, 3rd Dept., 1890) 56 Hun 507, 508].

In *People* v. *Buchanan, supra,* 145 N. Y. 1, the New York Court of Appeals authoritatively stated the doctrine that the presence of a third person at a conference between an attorney and client destroys the privileged nature of any communications made in such conference. Thus, the Court declared (at p. 26):

> "The protection extended by the statute to communications between attorney and client is intended to cover those which the relation calls for and are supposed to be confided to the lawyer, to guide him in giving his professional aid and advice. I am not

> aware of any extension of the rule, which would protect the revelation of confidences made to a friend, or to a lawyer in the presence of a friend."

The principle that no privilege attaches to statements made to an attorney which are intended to be communicated to others finds clear expression in *Bartlett* v. *Bunn, supra,* 56 Hun 507. After setting forth the statutory provision insuring the privileged character of confidential communications, the Court continued (p. 508):

> "But * * * when the communication is made for the purpose of its publication or communication to another it necessarily loses its privileged character, and section 836 of the Code provides expressly for such waiver.
>
> "It follows, therefore, that when from the very nature of the communication it was designed by the author for another, and to be communicated to such other, it loses its character as privileged."

The petitioner's ingenious argument that Dr. Reicher, the layman present at his conferences with the attorney Rosenblum, was also a client of Rosenblum's, is not supported by the record. Apart from that, it is a sufficient answer to that contention that it was never raised in the trial court or in the Court of Appeals and, consequently, is not here available [see cases cited at Point II, *infra*].

B. The New York rule, as applied by the state courts herein, contravenes no constitutional privilege.

In answer to the petitioner's argument that the rule of evidence above discussed is so outrageous as to contravene the defendant's constitutional rights, it is sufficient to note that the identical ruling prevails in the federal courts as well as in the courts of almost every state of the union [see *U. S.* v. *Cotter* (C. C. A. 2nd 1932) 60 Fed. (2d) 689, 691; cert. denied 287 U. S. 666; *Tutson* v. *Holland* (Ct. of App. Dist. of Col. 1931) 50 Fed. (2d) 338, 340, cert. den.

284 U. S. 632; *York* v. *United States* (C. C. A. 8th 1915) 224 Fed. 88, 91; 8 Wigmore *on Evidence* (3d Ed. 1941) §2311, pp. 600-603 and cases cited].

Wigmore states the proposition as follows:

> "The [attorney-client] privilege assumes, of course, that the communications are made with the intention of confidentiality. The reason for prohibiting disclosure * * * ceases when the client does not appear to have been desirous of secrecy. 'The moment confidence ceases,' said Lord Eldon, 'privilege ceases,' This much is universally conceded."
>
> * * *
>
> "One of the circumstances, by which it is commonly apparent that the communication is not confidential, is the *presence of a third person,* not being the agent of either client or attorney." (italics in original)

It can hardly be said, therefore, that the ruling in question is such as to deprive the petitioner "of a trial according to the accepted course of legal proceedings" [*Buchalter* v. *New York* (1943) 319 U. S. 427, 431].

POINT II

In any event, the petitioner raised no constitutional question in the state courts.

Examination of the record of the trial discloses that the Constitution of the United States was not even indirectly referred to during the time the witness Rosenblum was on the stand (404-566). Moreover, it was never contended in any state appellate court that the admission of Rosenblum's testimony deprived the petitioner of any right guaranteed him by the Federal Constitution. Indeed, the only reference to the Constitution contained in the petitioner's brief before the Court of Appeals in the State

of New York is the general statement quoted at pages two to three of the petition to the general effect that "The defendant [petitioner] did not receive a fair trial and was deprived of many of his constitutional rights and privileges."

We shall not burden this Court with a discussion of the cases establishing that such a record presents no constitutional question for decision in this Court [see *Herndon* v. *United States* (1935) 295 U. S. 441, 442-443; *House* v. *Road Imp. Dist.* (1924) 266 U. S. 175, 176; *Bowe* v. *Scott* (1914) 233 U. S. 658, 665; *Thomas* v. *Iowa* (1908) 209 U. S. 258, 263; *Harding* v. *Illinois* (1904) 196 U. S. 78, 86-88; *Miller* v. *Cornwall Railroad Company* (1897) 168 U. S. 131, 134].

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

FRANK S. HOGAN
District Attorney
New York County

WHITMAN KNAPP
RICHARD G. DENZER
Assistant District Attorneys
Of Counsel

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